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NO. 03-249

IN THE SUPREME COURT OF THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner,*

v.

GARY BRADLEY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Warden W. A. Duncan (the State) files this reply to respondent Gary Bradley's opposition to the petition for writ of certiorari. In its petition, the State seeks review on two questions: (1) whether a federal habeas corpus court may grant relief based on its own conclusion, contrary to that of the state courts, that state law required jury instructions on an affirmative defense like "entrapment"; and (2) whether, in harmless-error analysis, a federal court may consider the affidavits of trial jurors hypothesizing how the jury otherwise would have voted.

A. Mootness and "Equity."

1. Respondent Bradley argues that this Court should deny the State's petition for certiorari because the county district attorney's office has declined to re-prosecute him following the Ninth Circuit opinion ordering his release from prison. (Opposition Brief [Opp.] 1, 5-6.) But Bradley's argument is a non-sequitur. Despite some equivocation, Bradley himself seems constrained by the authorities he himself cites—e.g., *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983)—to acknowledge that the decision not to undertake a second trial eight years after the crime does not render this case

moot. (Opp. 5-6.) See also *Mancusi* v. *Stubbs*, 468 U.S. 204, 206-207 (1972). The controversy remains live and acute: resolution of the Questions Presented in the certiorari petition will determine whether Bradley must be returned to prison under his 1997 judgment of conviction in state court, as well as whether future state criminal judgments in other cases will be enervated on the basis of federal-court intrusion into state-law questions. Otherwise, a court of appeals could practically insulate its decision from Supreme Court review simply by ordering a prisoner's release and then refusing to stay its judgment.

2. Bradley instead suggests, illogically and irrelevantly, that the State's petition should be denied for "equitable" reasons because it seeks to "undermine the policy decision of the local District Attorney's Office" not to re-prosecute him. (Opp. 5-6.) But, even if such an allegation mattered, there is no inconsistency in policy in this case. The State through its Attorney General seeks to uphold the 1997 judgment and sentence first obtained as a result of the policy decision of the district attorney to seek, in the State's name, Bradley's conviction and punishment as a "three-strikes" recidivist in the first place. For its part, the local district attorney's office has made no "policy decision" that the 1997 criminal judgment should not be enforced. On the contrary, the district attorney apparently refrained from entering into any further trial proceedings or settlement that Bradley then could cite as superseding or mooting out the criminal judgment at issue in the certiorari petition.

Regardless of Bradley's extra-record hearsay assertion about the prosecutor's reasons in his case (see Opp. 5), a local prosecutor's decision not to re-try a case eight years after the fact properly may depend upon resources, availability of witnesses, loss of physical evidence, etc. Whatever the reason, it in no way would signify a "policy decision" that the prior judgment he sought and obtained should be abandoned even where the federal court erred in upsetting it. Concerning that

judgment, the only operative "policy decision," and the only one logically relevant to this Court's certiorari discretion, is the State's decision to seek to enforce Bradley's criminal judgment through review of the Ninth Circuit's grant of habeas corpus relief.

B. Affirmative-Defense Question.

1. Also fruitless is Bradley's effort to deny that the Ninth Circuit, in violation of *Estelle* v. *McGuire*, 502 U.S. 62 (1991), allowed federal habeas corpus relief for a "mere error of state law." (Opp. 7.) The panel majority's opinion went to great lengths to explain that the state court had erred under California law in failing to instruct Bradley's jury on entrapment, and then purported to find the constitutional due-process violation on that basis. (See Petition [Pet.] 5, 11-12; Pet. Appendix [App.] A5-A9.) In rejecting a claim almost identical to Bradley's in *Gilmore* v. *Taylor*, 508 U.S. 338, 344 (1993), this Court recognized that validating a habeas corpus claim based on alleged error with respect to a state-law affirmative defense "would make a nullity of the rule reaffirmed in *Estelle* v. *McGuire*."

2. Citing *Cupp* v. *Naughten*, 414 U.S. 141 (1973), Bradley posits that some state-law errors might rise to the level of violations of the Constitution. (Opp. 8-9.) The State addressed that general point in its petition, discussing *Naughten* and explaining that, to support federal relief, the instructions in this case would have to violate the Constitution without regard to whether they also happened to violate state law. (Pet. 11.) That proposition is what gives rise to the petition's first "Question Presented." For, here, the Ninth Circuit purported to find a due-process violation merely upon its conclusion, contrary to that of the state courts, that Bradley had been entitled to entrapment-defense instructions under California law.

3. In its petition, the State also argued that the Ninth Circuit opinion further ran afoul of *Gilmore* v. *Taylor's* "new

rule" holding: that federal relief on an instruction-error claim based on a state-law affirmative defense would violate the anti-retroactivity doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989). (See Pet. 6, 10-11.) Bradley's opposition brief, however, remains completely silent on how the opinion below conceivably might be reconciled with *Taylor's* holding on the *Teague* question.

4. Bradley also fails is his effort to minimize the conflict between the Ninth Circuit's opinion in this case and the Third Circuit's opinion in the affirmative-defense case of *Johnson* v. *Rosemeyer*, 117 F.3d 104 (3d Cir. 1997). Bradley relies on the later comments in *Smith* v. *Horn*, 120 F.3d 400 (3d Cir. 1997)—comments to which the State's certiorari petition itself referred (Pet. 14)—explaining that *Johnson* did not permit the states to convict without proof beyond a reasonable doubt of the elements of the offense. (Opp. 12-13.) But Bradley's citation to *Smith* merely begs the question. The issue in this case, as in *Johnson* and as in *Taylor*, concerns affirmative defenses and not the elements of the crime. See *People* v. *Mower*, 28 Cal.4th 457, 480-481 (2002) (entrapment under California law concerns police misconduct, not the elements of a crime, and must be proved by the defendant by a preponderance of evidence).[1]

C. Juror-Affidavit Question.

Bradley last says that certiorari is unjustified on the question of whether the federal court may consider juror affidavits in harmless-error analysis. (Opp. 16-18.) He does not defend the panel's consideration of the affidavits; and, indeed, the cases he cites strongly suggest that it was indefensible under established law. Instead, he offers speculation that the panel would have found the alleged error harmless anyway, and

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1. On page 4 of the certiorari petition, the State's garbled citation to "*People* v. *Reliford*, 28 Cal.4th 647" instead should have referred to *Mower*, 28 Cal.4th 457, for this explanation of California entrapment law.

predicts that other courts will not fall into the same practice. His assurances are rather cold comfort. The panel relied on the affidavits in its own harmless-error evaluation. (Pet. App. A12-A13.) And it separately condemned as "objectively unreasonable" under 28 U.S.C. § 2254(d)(1)—a deferential habeas corpus standard of review that is supposed to make the writ harder to obtain—the state court's refusal to consider the affidavits in the state proceedings. (*Id.*, at A14.) The panel departed widely from "the accepted and normal course of judicial proceedings," see SUP. CT. R. 10(a); and, regardless of whether "incidental," the opinion's repeated references to the admissibility of the affidavits threaten further mischief in future cases.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: September 24, 2003

Respectfully submitted,

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